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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1469

JOANNE ERSKINE COSE, *Petitioner,*

v.

LEROY EDWARD COSE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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March 12, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

JOANNE ERSKINE COSE, *Petitioner,*

v.

LEROY EDWARD COSE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

Petitioner Joanne Erskine Cose petitions for a writ of certiorari to review the judgment of the Supreme Court of Alaska.

OPINION BELOW

The divorce decree of the Anchorage superior court is unreported. (App. A, *infra*). The opinion of the Alaska Supreme Court is reported at 592 P.2d 1230

(1979). (App. B, *infra*). The original mandate of June 19, 1979, is unreported. (App. C, *infra*). The order denying the first petition for reconsideration is unreported. (App. D, *infra*). The order granting the second petition for reconsideration and affirming the original Alaska Supreme Court opinion is unreported. (App. E, *infra*). The supplemental mandate is unreported. (App. F, *infra*). The Alaska Supreme Court's December Activity Report discussing the purpose of the order granting the second petition for reconsideration is unreported. (Relevant pages are App. G, *infra*).

JURISDICTION

The judgment of the Alaska Supreme Court was entered June 19, 1979. The second petition for reconsideration was granted and the supplemental mandate affirming the original opinion issued December 20, 1979, specifically to extend the time for filing this petition for certiorari until March 19, 1980. (App.'s E, F, and G).[1] This Court's jurisdiction is invoked under 28, U.S.C. §1257(3).

QUESTION PRESENTED

Whether federal law prohibits the division of military retired pay in a divorce.

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[1] Petitioner originally requested from this Court an extension of time to file a petition for certiorari. That request was denied. Petitioner then requested the Alaska Supreme Court to grant the second petition for reconsideration and issue a supplemental mandate extending the time for filing this petition for certiorari. In an order that may be virtually unique since statehood, the Alaska Supreme Court granted the second petition and issued a supplemental mandate, thus extending the time for filing this petition for certiorari.

STATUTES INVOLVED

See Appendix H.

STATEMENT OF THE CASE

The parties were married on November 14, 1954, five months after Respondent commenced active duty with the U.S. Army. They filed for divorce September 16, 1974. Respondent retired as a lieutenant colonel July 1, 1975 after twenty-one years of active duty. The parties were divorced October 29, 1976.

The Anchorage superior court held Respondent's retired pay was divisible and awarded Petitioner one-half the $1,100 monthly payments, terminable upon either party's death.[2] App. B at 1-2, 592 P.2d at 1230-31.

Respondent appealed to the Alaska Supreme Court, asserting the retired pay was income and not divisible property. Citing *Wissner* v. *Wissner,* 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950), and *Free* v. *Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 2d 180 (1962), he also argued that treating the retired pay as property interfered with the Congressional intent and was barred by Article VI, clause 2, the supremacy clause of the United States Constitution.

Finding no evidence that Congress intended retired pay to be divisible, the Alaska Supreme Court applied a presumption against divisibility. Relying on what it perceived to be the reasoning of *Hisquierdo* v. *Hisquier-*

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[2] The other property, relatively minor in value, was settled as per agreement between the parties. Respondent was awarded custody of the parties' two minor children and Petitioner was ordered to pay child support to be deducted from the military retired pay awarded to her.

do, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), the court held military retired pay could not be divided in a divorce.

REASONS FOR GRANTING THE WRIT

The writ should be granted for four reasons.

1. The Decision Below Conflicts With The Decisions Of The Highest Courts Of Other States And With The Only Reported Decision Of A Court of Appeals.

The highest courts of the following states have ruled that military retired pay is divisible in a divorce:

Arizona: *Czarnecki* v. *Czarnecki,* 123 Ariz. 466, 600 P.2d 1098 (1979).

California: *Henn* v. *Henn,* _____ Cal.3d _____, _____ P.2d _____, 161 Cal.R. 502 (January 29, 1980), In re *Fithian,* 10 Cal. 3d 592, 517 P.2d 449, 111 Cal.R. 369, cert. denied, 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 (1974).

Idaho: *Ramsey* v. *Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975).

New Jersey: *Kruger* v. *Kruger,* 73 N.J. 464, 375 A.2d 659 (1977).

New Mexico: *LeClert* v. *LeClert,* 80 N.Mex. 253, 453 P.2d 755 (1969).

Texas: *Busby* v. *Busby,* 457 S.W. 2d 551 (1970).

Washington: *Payne* v. *Payne,* 82 Wash.2d 573, 512 P.2d 736 (1973).

The only reported decision of a court of appeals also holds that military retired pay is divisible.

Bodenhorn v. *Bodenhorn,* 567 F.2d 629 (5th Cir. 1978) (applying Canal Zone law).

Intermediate courts of appeals in the following states have permitted division:

Illinois: *In re Marriage of Musser,* 70 Ill.App.3d 706, 27 Ill.Dec.240, 388 N.E.2d 1289, (1979).

Louisiana: *Swope* v. *Mitchell,* 324 So.2d 461 (La.App.1975).

Michigan: *Chisnell* v. *Chisnell,* 82 Mich.App. 699, 267 N.W.2d 155, appeal denied, _____ Mich. _____, _____ N.W.2d _____(1978), cert. denied _____ U.S. _____, _____ S.Ct. _____, _____ L.Ed. 2d _____ (1979).

The highest courts of the following states have prohibited division of retired pay.

Alaska: *Cose* v. *Cose, supra.*

Arkansas: *Fenney* v. *Fenney,* 259 Ark. 858, 537 S.W.2d 367 (1976).

Colorado: *Ellis* v. *Ellis,* 191 Colo. 317, 552 P.2d 506 (1976).

Since *Hisquierdo* was issued, a unanimous Supreme Court of Arizona and the Illinois Court of Appeals have distinguished it and permitted division of military retired pay. *Czarnecki* v. *Czarnecki, supra, In re Marriage of Musser, supra,* 388 N.E.2d at 1291-92. In January 1980 a unaminous California Supreme Court did likewise. *Henn* v. *Henn, supra,* 161 Cal.R. at 503-04. The conflict

between the case at bar and these cases is square and irreconcilable. Each case held *Hisquierdo* was not controlling and each permitted division of the military retired pay. *Hisquierdo,* if controlling, would have mandated the opposite result and, as in the case at bar, prevented division of the retired pay.

This court has denied certiorari in three cases holding retired pay is divisible. *In re Fithian, supra, Starren* v. *Starren,* _____ Cal.3d _____, _____ P.2d _____, _____ Cal. R. _____ (January 17, 1979), (apparently unreported), cert. denied, _____ U.S. _____, _____ S.Ct., _____ L.Ed. _____, 5 F.L.R. 2938 (week of September 25, 1979), and *Chisnell* v. *Chisnell, supra.* The case at bar is the first case to come before this Court holding military retired pay is not divisible.

This split among the states is particularly important because of the regularity with which military personnel are transferred. The dichotomy encourages forum shopping. Normally such a split is a matter of state law. However here there is a strong federal interest in uniform interpretation of the federal military statutes.

2. The Issue Presented Is Important And Recurring, Affecting Thousands Of Divorces Annually Across the Country.

As the above decisions reflect, this is an important federal question, arising almost exclusively in state courts. With the increasing number of divorces nationwide and the large number of retired servicemen, the issue arises with great frequency in all states.

In most cases, the ex-serviceman's retired pay is the largest single asset of the marriage (perhaps equalled only by the family residence). Moreover, retired pay

may provide the most ready source of cash for division at divorce. For these reasons the issue assumes paramount importance in many miliary divorces.

The issue is important even in divorces in which the serviceman is still on active duty. In some cases the serviceman already has over twenty years on active duty and his pension has already vested. In other cases, although the pension has not vested, state law permits division of the unvested retired pay. See e.g. *In re Marriage of Brown,* 15 Cal.3d 838, 544 P.2d 561, 125 Cal.R. 633 (1976).

Because of the thousands of divorces that will continue to be affected annually, the issue is of sufficient importance to warrant certiorari.

3. The Issue Presents Important Questions Concerning The Accomodation Of State and Federal Interests Under The Constitution.

The divisibility of federal retired pay presents important issues involving divorce law, an area almost entirely regulated by the states, and the distribution of federal remuneration, an area in which the federal government and Congress have important concern. Cf. *Hisquierdo* v. *Hisquierdo, supra,* 439 U.S. at 581 *et seq.* In that case this Court reaffirmed the rule that state law remains paramount in this field unless "Congress has 'positively required by direct enactment' that state law be pre-empted." 439 U.S. at 581.

The Alaska decision, by finding such pre-emption from Congressional *silence,* creates a new rule and, in effect, overrules *Hisquierdo* and the previous cases on which the rule was based. See *Wetmore* v. *Markoe,* 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390 (1904), *United*

States v. *Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). The Alaska decision presages increasing encroachment of federal law into this area. If the presumption is reversed and, as the Alaska court held, Congress is *presumed* to pre-empt unless the statute and history indicate to the contrary, this Court's rulings dating back nearly eighty years, plus much modern Congressional legislation will be reversed. Equally importantly the virtually unbroken policy of federal abstention in the domestic relations field will be overturned.

4. The Alaska Supreme Court Improperly Applied *Hisquierdo* v. *Hisquierdo* To Bar The Divisibility Of Military Retired Pay.

Hisquierdo focused on the Railroad Retirement Act of 1974, particulary 45 U.S.C. §231m, which provides:

> "notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . ."

This section was held to bar division of railroad retirement benefits and anticipation of them in the division of other marital assets.

Cose recognized there is no equivalent military retired pay statute when the court stated

> "The statutes are silent as to the rights of dependents of the retiree. . .
>
> "One searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce." 592 P.2d 1232.

From the absence of a statute and from the absence of an affirmative congressional intent permitting division, the Alaska court implied a Congressional intent to *prohibit* division of the retired pay. The authority for this conclusion was not *Hisquierdo* itself (th case was not cited for this proposition), but a 1973 pre-*Hisquierdo* law review article by a Sacramento superior court judge, Goldberg, "Is Armed Services Retired Pay Really Community Property?" 48 Cal.St.Bar J. 12 (1973).

Judge Goldberg's article proceeded from the premise that the supremacy clause will not permit division of federal military retirement benefits in a divorce unless the federal statute specifically allows it. In his examination of the federal military retired pay statutes, Judge Goldberg was unable to find any statute addressing the property division issue. He thus concluded retired pay is not divisible. The issue then is the consequence of federal silence.

Hisquierdo directly rejected the Goldberg-*Cose* approach, holding retirement pay *is* divisible unless the federal statute expressly prohibits division and such division is "sufficiently injurious" to the federal program to require non-recognition of the wife's asserted claim. 439 U.S. at 583.

There is no military retired pay statute similar to 45 U.S.C. §231m. The military testamentary annunity provisions cited by the Alaska court (10 U.S.C. §§1434(c), 1447-1455) have nothing to do with the retired pay itself, which belongs to the serviceman and terminates on his death. *Czarnecki* v. *Czarnecki, supra*. Nor is the military annunity anti-assignment clause (10 U.S.C. §1440) similar to 45 U.S.C. §231m. *Gorman* v. *Gorman*, 90 Cal.App.3d 454, _____, 153 Cal.R. 479, 482-83 (1979).

The army retired pay statutes under which Respondent received his benefits, 10 U.S.C. §§3911, 3929 and 3991, are silent on the divisibility issue, as is the legislative history. There was no basis therefore to presume Congress intended to prohibit divisibility.

The Alaska Supreme Court granted Petitioner's second petition for reconsideration (which was itself out of time) to extend the time to file this petition for certiorari. That was a most unusual order, possibly unique since statehood, enabling this Court to take the case and decide the issue. It is submitted that the Alaska court also thought the case is sufficient important to warrant review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Alaska.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

JOANNE ERSKINE COSE, *Plaintiff*

v.

LEROY EDWARD COSE, *Defendent.*

Case No. 74-5894

Decree

THIS MATTER having come before this court, and Findings of Fact and Conclusions of Law having been entered,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the bonds of matrimony heretofore and now existing between the plaintiff and the defendant are hereby dissolved and held for naught.

2. That the plaintiff shall be awarded one-half (½) of the military retirement received by the defendant, payable as follows:

FIVE HUNDRED FIFTY DOLLARS ($550.00) per month, less ONE HUNDRED FIFTY DOLLARS ($150.00) representing this Court's assessment of her contribution to the support of the two minor children, to commence August 1, 1975. At the time the minor child Warren, reaches the age of nineteen (19) years the plaintiff's assessment for child support shall be reduced to ONE HUNDRED DOLLARS ($100.00) per month and that sum will be deducted from her monthly share of FIVE HUNDRED FIFTY DOLLARS ($550.00). When Kevin reaches the age of nineteen (19) years the plaintiff will be entitled to receive from the Defendant her full fifty (50%) share of that monthly retirement income at the rate of FIVE HUNDRED FIFTY DOLLARS ($550.00) per month until her death or the death of the defendant.

3. That the defendant shall be awarded the sole, care, custody and control of the two minor children remaining at home with reasonable and liberal visitation rights in the plaintiff.

4. That the plaintiff shall receive $0 toward her costs and attorney fees incurred in the prosecution of this action.

5. That the division of the remaining property, both real and personal, acquired during the course of the marriage, orally entered upon the record herein shall be adopted by this court as a full and equitable division of said property.

6. That the plaintiff shall have her maiden name of Erskine returned to her.

DATED AT Anchorage, Alaska this 20th day of October, 1976.

ELEN H. LEWIS
Judge of the Superior Court

APPENDIX B

SUPREME COURT OF ALASKA

LEROY EDWARD COSE, *Appellant,*

JOANNE ERSKINE COSE, *Appellee.*

JOANNE ERSKINE COSE, *Cross-Appellant,*

v.

LEROY EDWARD COSE, *Cross-Appelle.*

Nos. 3243, 3244

March 30, 1979

Allen L. Jewell, Hahn, Jewell and Stanfill, Anchorage, for appellant and cross-appellee.

Timothy M. Lynch, Abbott, Lynch, Farney and Rodey, Anchorage, for appellee and cross-appellant.

Before BOOCHEVER, C.J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, J.J.

Opinion

CONNOR, Justice.

The major issue in this appeal and cross appeal is whether in divorce proceedings military retirement pay is to be considered future income to the retiree or property divisible between the parties. Appellant Leroy Cose challenges the superior court's determination that his retirement pay was property acquired during his marriage to appellee and therefore divisible under AS09.55.210(6).

Appellant entered the United States Army in June of 1954 and on November 14, 1954 he and appellee Joanne Cose were married. After a marriage of twenty years, during which time appellant remained in military service as an officer, appellee filed a complaint for divorce on September 16,1974. On July 1, 1975, while the divorce was still pending, appellant was officially separated from the Army, having elected to

retire from active service. Thereafter, on October 29, 1976, the superior court entered a final decree of divorce. At the time, the court held that appellant's military retirement pay of $1,100 per month was divisible property and it awarded appellee one-half of the monthly payments until her death or that of appellant.[1] The court further ordered that their remaining property be divided in accordance with an agreement between them. Appellant was awarded custody of the couple's two minor children and appellee's request for attorney's fees was denied. In a cross-appeal, appellee asserts that the superior court abused its discretion in denying her attorney's fees.

Appellant Cose receives military retirement benefits pursuant to 10 U.S.C. §§3911, 3929, and 3991. Under these statutes, a regular or reserve commissioned officer in the Army may request retirement after 20 years of service and upon such retirement he is entitled to retirement benefits, or in the words of the statutes, "retired pay." Benefits are received monthly and are computed on the basis of the officer's years of service and his retired grade pay level. Under 26 U.S.C. §61(a)(11), they are taxable as ordinary income when received. Benefits terminate on the death of the retiree. The officer does not contribute to a retirement fund during the course of his service.

A number of courts have held that military retirement pay is property divisible upon divorce rather than income to the recipient. *E. g. Ramsey* v. *Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975): *In Re Marriage of Fithian,* 10 Cal.3d 592, 111 Cal. Rptr. 369 517 P.2d 449 (1974), *cert. denied,* 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 (1974); *Payne* v. *Payne,* 82 Wash.2d 573, 512 P.2d 736 (1973); *LeClert* v. *LeClert,* 80

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[1] The court also ordered that appellee contribute $150 per month toward support of the two minor children in appellant's custody. These support payments were to be deducted from appellee's share of the military retirement pay with a reduction to $100 per month when the first child reached age 19.

N.M. 235, 453 P.2d 755 (N.M. 1969); *Kruger* v. *Kruger,* 139 N.J.Super. 413, 354 A.2d 340 (1976), modified on appeal, 73 N.J. 464, 375 A.2d 659 (1977); *Mora* v. *Mora,* 429 S.W.2d 660 (Tex.Civ.App.1968). Those courts have reasoned that military retirement pay is neither a payment for present services nor a gratuity bestowed upon the employee by a beneficent employer. Rather, the pay constitutes compensation for past services and is part of the consideration earned by the serviceman. Thus retirement pay is considered an earned property right which accrues by reason of and in the course of the individual's years of military service. Therefore, to the extent that such benefits were earned during marriage, they are treated as property of the marriage and are divisible as such.

Other courts have rejected this reasoning and have held that military retirement pay is income to the recipient and not divisible property. *Ellis* v. *Ellis,* 552 P.2d 506 (Colo. 1976); *Fenney* v. *Fenney,* 259 Ark. 858, 537 S.W.2d 367 (1976). The *Ellis* court has emphasized that under 42 U.S.C.A. §659 such benefits cannot be garnished or attached except for alimony or child support payments; and that generally military retirement pay has no lump sum value, cash surrender value, loan value, redemption value or value realizable after death.

Appellant contends that the treatment of federal military retirement pay as divisible property interferes with the purpose of Congress in enacting the military retirement pay system and that such treatment therefore is prohibited by the supremacy clause of the United States Constitution.[2] He bases this argument in part on the United States Supreme Court's decisions in *Wissner* v. *Wissner,* 338 U.S. 655, 70 S.Ct. 398,

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[2] Article VI, clause 2 of the United States Constitution states in pertinent part:

> "This Constitution, and the Laws of the Unted States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the Untied States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

94 L.Ed. 424 (1950) and *Free* v. *Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962).

In *Wissner,* a state court ordered the named beneficiary of life insurance proceeds under the National Service Life Insurance Act (38 U.S.C. §§801 *et seq.*) to pay half of the proceeds, as community property, to the deceased soldier's widow. The Supreme Court held that under the supremacy clause, the state order was invalid because the specific language of the Act, when read in light of congressional intent, gave the insured serviceman the absolute right to select the beneficiary of his choice. Therefore, state community property law could not be applied in conflict with this federal right. *Free* v. *Bland* dealt with a similar situation. There, petitioner Free had purchased United States Savings Bonds which were issued to "Mr. or Mrs." Free. Treasury regulations provided that when either co-owner of such bonds died, the survivor would become sole and absolute owner. Mrs. Free died, and despite the survivorship provision, the state court held that the principal beneficiary under her will was entitled to one-half of the bonds under community property principles. The Supreme Court reversed, holding that the supremacy clause invalidated state law which violated Mr. Free's federally created right of survivorship in the bonds.

Of major significance is the recent opinion in *Hisquierdo* v. *Hisquierdo,* _____ U.S. _____, 99 S.Ct. 802, 59 L.Ed. 1 (1979), which relates to benefits under the Railroad Retirement Act. In that case, the Supreme Court of California held that a railroad worker's anticipated benefits could be divided as community property, even though under the act the benefits for an employee's spouse terminate upon divorce, and the benefits are not assignable or subject to legal process except for paying child support or alimony obligations. The United States Supreme Court reversed, holding that to order the worker to pay a portion of his benefits would contravene the intention of Congress. It is the ascertainment of legislative intent that provides the solution to the problem.

Some clues as to Congressional intent can be gathered from the statutes and pertinent background materials. Although the statutes are silent as to rights of dependents of the retiree, they do include a method by which the serviceman can use a portion of his retired pay to purchase an annuity for his widow. 10 U.S.C. §§1447-1455. Under this plan only a widow, not a surviving ex-wife, is eligible for benefits. Moreover, when the wife can no longer be a beneficiary because of divorce, deductions from retired pay cease. 10 U.S.C. §1434(c). In the passage of the law setting up this plan, provisions which would have protected ex-wives were stricken from the law before its passage. 118 Cong.Rec.S. 29810-12 (1972). In this respect Congress purposefully excluded ex-wives from benefitting under the plan. One searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce.[3]

In view of the legislative treatment of military retired pay and the decision in *Hisquierdo* v. *Hisquierdo, supra* we hold that armed forces retired pay is not property which is divisible upon divorce. Given the federal legislative treatment of military retired pay and the decision in *Hisquierdo,* we find it unnecessary to classify retired pay as income or property under state law. The federal Supremacy Clause prohibits application of state property settlement concepts relating to divorce proceedings to such military benefits regardless of our holding on this matter. Thus, we must reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

MATTHEWS, Justice, concurring

I believe that this case is controlled by *Hisquierdo* v. *Hisquierdo,* _____ U.S. _____, 99 S.Ct. 802, 59 L.Ed. 1 (1979), and therefore agree that the decision of the superior court

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[3] See Goldberg, "Is Armed Services Retired Pay Really Community Property?" 48 Cal. State Bar J. 12 (1973).

must be reversed. Except for that decision I would have found no federal pre-emption, in accord with such decisions as *Ramsey* v. *Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975), and *In Re Marriage of Fithian,* 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449 (1974).

As a matter of state law it is clear that retirement pay must be considered in dividing marital property. AS 09.55.210(6) requires that property acquired during marriage be divided "in the manner as may be just" and in so deciding we have consistently required consideration of the financial circumstances of each party. *E. g. Merrill* v. *Merrill,* 368 P.2d 546, 547-48 n. 4 (Alaska 1962); *Malone* v. *Malone,* 587 p.2d 1167 (Alaska 1978). Often the major asset of a retired military family is the husband's retirement pay. To award that to the husband and divide the remaining assets between husband and wife as if the retirement benefit did not exist is to ignore the husband's financial circumstances. It is also plainly unfair to the wife.

APPENDIX C

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee,*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant.*

TO: Superior Court of the State of Alaska, Third Judicial District at Anchorage.

Leroy Edward Cose filed an appeal from an order of the Superior Court, Third Judicial District at Anchorage, in Civil Action No. 74-5894 entitled, "JOANNE ERSKINE COSE, Plaintiff, vs. LEROY EDWARD COSE, Defendant." Joanne Erskine Cose filed a cross-appeal from the same order. The cases were considered on the briefs submitted. On March 30, 1979, the court filed its written opinion. Appellees' and Cross-Appellants' petition for rehearing and amended petition for rehearing was denied on June 18, 1979.

IT IS ORDERED:

1. The order of the Superior Court, entered October 29, 1976, is reversed and the case is remanded to the Superior Court for further proceedings consistent with the opinion filed March 30, 1979.

2. Apppellant/Cross-Appellee shall recover from Appellee/Cross-Appellant costs and attorney's fees as shown below:

Costs and Attorney's Fees

Filing Fee	$ 50.00
Duplicating Appellant's Brief	83.80
Duplicating Reply Brief	110.00
Attorney's Fee	200.00
Total	$443.80

WITNESS the Honorable Jay A. Rabinowitz, Chief Justice of the Supreme Court, State of Alaska, this 19th day of June, 1979.

Clerk of the Supreme Court
Robert D. Bacon

/s/ CONNIE STASKA
By: Connie Staska,
Chief Deputy Clerk

APPENDIX D

THE SUPREME COURT OF THE STATE OF ALASKA

File Nos. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant*

Order

(filed June 21, 1979)

On consideration of the petition for rehearing, filed April 3, 1979, and the amended petition for rehearing, filed April 5, 1979, and the notice of supplemental authority, submitted May 10, 1979,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Juneau, Alaska, on June 18, 1979.

Clerk of the Supreme Court

/s/ ROBERT D. BACON
Robert D. Bacon

Justice Boochever dissents in part from this order for the reasons stated in the attached memorandum.

cc: Justices
Counsel

BOOCHEVER, Chief Justice, dissenting in part from denial of petition for rehearing.

The petition for rehearing requests that we address the question of whether the court on remand may consider the right to retirement payments as a factor for determination of alimony. I do not construe *Hisquierdo* v. *Hisquierdo,* _____ U.S. _____, 59 L. Ed. 2d 1 (1979), as preventing consideration of the right to vested military retirement payments in determining whether alimony should be awarded to a spouse, and, if so, the amount of alimony. I, therefore, believe that the trial court is not foreclosed from such considerations upon remand. 42 U.S.C.A. §659(a) (Supp. 1979) expressly provides that moneys due from the United States to any individual including members of the armed services are subject to legal process for the enforcement of payments for alimony.

The petition for rehearing also refers to the fact that our opinion does not deal with the matter of attorney's fees raised in the cross-appeal. I would expressly indicate that upon remand, the question of attorney's fees should again be considered by the trial court.

APPENDIX E

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee,*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant.*

Order

Before: Rabinowitz, Chief Justice, Connor Boochever and Matthews, Justices. [Burke, Justice, not participating.]

On consideration of the request for reconsideration by the full court, filed October 24, 1979, and the request for oral argument, filed October 8, 1979,

IT IS ORDERED:

1. The request for full court reconsideration is granted. The clerk is directed to file the untimely second petition for reconsideration dated October 5, 1979.

2. The second petition for reconsideration is granted.

3. The request for oral argument on reconsideration is denied.

4. On reconsideration, the decision of the Superior Court is reversed and the case is remanded for the reasons stated in the opinion filed March 30, 1979, 592 P.2d 1230.

5. The clerk shall issue a supplemental mandate on the next business day in accordance with Appellate Rule 28.

Entered by direction of the court at Juneau, Alaska, on December 19, 1979.

Clerk of the Supreme Court

/s/ ROBERT D. BACON
Robert D. Bacon

Distribution:

Justices
Counsel
Linda Reser (Superior Ct. No. 74-5894 CIV)

APPENDIX F

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee,*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant.*

SUPPLEMENTAL MANDATE

TO: The Superior Court of the State of Alaska, Third Judicial District at Anchorage.

Leroy Edward Cose filed an appeal from an order of the Superior Court, Third Judicial District at Anchorage, in Civil Action No. 74-5894 entitled, "JOANNE ERSKINE COSE, Plaintiff, vs. LEROY EDWARD COSE, Defendant." Joanne Erskine Cose filed a cross-appeal from the same order. The cases were considered on the briefs submitted. On March 30, 1979, the court filed its written opinion. Appellee and Cross-Appellant's petition for rehearing and amended petition for rehearing were denied on June 18, 1979. Appellee and Cross-Appellant was granted leave to file a second petition for rehearing on December 19, 1979, the second petition for rehearing was granted, and the written opinion of March 30, 1979, was reaffirmed on December 19, 1979.

IT IS ORDERED:

The order of the Superior Court, entered October 29, 1976, is reversed and the case is remanded to the Superior Court for further proceedings consistent with the opinion filed March 30, 1979.

WITNESS the Honorable Jay A.Rabinowitz, Chief Justice of the Supreme Court, State of Alaska, this 20th day of December, 1979.

Clerk of the Supreme Court
/s/ ROBERT D. BACON
Robert D. Bacon

APPENDIX G

ALASKA SUPREME COURT

Activity Report—December, 1979

During December, 1979, the Alaska Supreme Court determined the matters listed below:

* * *

VI. Petitions For Rehearing

3243/3244 Cose v. Cose. Motion to file untimely petition for rehearing granted, petition granted, and opinion (592 P.2d 1230) reaffirmed December 19. Procedure was requested by new counsel for the appellee to enable filing of timely petition for certiorari in the United States Supreme Court.

* * *

APPENDIX H

10 U.S.C. §3911 reads in relevant part:

"§3911. *Twenty years or more: regular or reserve commissioned officers*

"The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer."

10 U.S.C. §3928 reads in relevant part:

"§3939. *Computation of retired pay: law applicable.*

"A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title."

10 §3991

Chapter 371.—Computation of retired pay.

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

Formula	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
A	3883 3884 3885 3886 3913 3915 3916 3919 3921 3922 3923	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 3888 or 3927(b), whichever is applicable.[4]	Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.	Excess over 75% of pay upon which computation is based.
B	3911 3918 3920 3924	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 1405 of this title.[4]		Excess over 75% of pay upon which computation is based.
C	3914	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]	10% of product of columns 1 and 2 for extraordinary heroism in line of duty.[5]	Excess over 75% of pay upon which computation is based.
D	3917	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]		Excess over 75% of pay upon which computation is based.

[1] For the purposes of this section, determine member's retired grade as if section 3962(c) did not apply and, for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.

[2] Compute at rates applicable on date of retirement.

[3] Compute at rates applicable on date of retirement, or if the member has served as sergeant major of the Army, compute at the highest basic pay applicable to him while he so served, if such basic pay is greater.

[4] Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

[5] The Secretary of the Army's determination as to extraordinary heroism is conclusive for all purposes.

APR 1

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1469

JOANNE ERSKINE COSE, *Petitioner*

v.

LEROY EDWARD COSE, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION

Allen L. Jewell
HAHN, JEWELL & STANFILL
542 W. Second Avenue
Anchorage, Alaska 99501
Counsel for Respondent

April 15, 1980

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1469

JOANNE ERSKINE COSE, *Petitioner*

v.

LEROY EDWARD COSE, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Leroy Edward Cose, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Alaska Supreme Court in this case.

OPINION BELOW

The opinion of the Alaska Supreme Court is reported at 529 P. 2d 1230 (1979). (Pet. 3a-8a).

JURISDICTION

Although jurisdiction is technically available to the petitioner in this case, respondent respectfully requests that this Court not exercise its discretionary power where the finality of a judgment has so lately been disregarded for the sole purpose of affording this petitioner a second opportunity to seek review.

The opinion of the Alaska Supreme Court was issued March 30, 1979. The timely petition for rehearing and amended petition for rehearing were denied on June 18, 1979 (Pet. 11a). The mandate of the Alaska Supreme Court was issued June 19, 1979. (Pet. 9a-10a). On September 21, 1979, Mr. Justice Rehnquist denied a timely application for an extension of time in which to file a petition for writ of certiorari on this question. (App. A, *infra*). A subsequent application to the Alaska Supreme Court to accept a second petition for reconsideration was denied on October 15, 1979. (App. B, *infra*). Thereafter, on December 19, 1979, a request for full court reconsideration of the request to accept a second petition for reconsideration was granted for the express purpose of affording petitioner a second opportunity to file a petition for writ of certiorari with this Court. (Pet. 13a-14a, 16a).

QUESTION PRESENTED

Whether Article VI, Clause 2 of the United States Constitution prohibits the division of military retired pay in a divorce action.

CONSTITUTIONAL PROVISIONS AND STATUTES

See Appendix C.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set forth in petitioner's brief (Pet. 3, 4) in all respects but one.

The Alaska Supreme Court did not apply a presumption against divisibility of military retired pay as asserted by petitioner.

Rather, the Alaska Supreme Court found *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 59 L. Ed. 2d 1 (1970) to be controlling and ruled that the Federal Supremacy Clause prohibits application of state property settlement concepts relating to divorce proceedings to military retired pay. 592 P. 2d at 1232.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Writ Should Not Be Granted Because The Question Raised In The Petition Is Controlled By Past Decisions Of This Court.

In *Hisquierdo v. Hisquierdo,* supra, this Court ruled that the Federal Supremacy Clause precluded California from dividing retirement benefits available under the Railroad Retirement Act (45 U.S.C. §231 et. seq.) through application of its community property principles. Respondent submits that this decision controls the issue raised by petitioner.

As *Hisquierdo v. Hisquierdo,* supra, makes clear, retirement benefits payable under the Railroad Retirement Act are not attachable (45 U.S.C. §231m) except that they are available to secure child support and alimony payments (42 U.S.C. §659). Congress specifically excluded

the division of community property from its definition of alimony for purposes of 42 U.S.C. §659 (42 U.S.C. §662(c)) and any right of the spouse of retiree to an annuity under the Railroad Retirement Act is lost after divorce. (45 U.S.C. §231d(c)(3)).

The parameters surrounding respondent's retirement benefits are substantially similar to those outlined in *Hisquierdo v. Hisquierdo.* Military retired pay is not available for attachment under the doctrine of sovereign immunity with the same important exception. *Buchanan v. Alexander,* 4 Haw. 20, 45 U.S. 20, 11 L.Ed. 857 (1846), *Applegate v. Applegate,* 39 F. Supp. 887 (D.C. 1941), *Arnold v. United States,* 331 F. Supp. 42 (D.C. 1971). 42 U.S.C. §659 operates to allow attachment for purposes of securing child support or alimony payments and again, the division of community property is not encompassed by Congress's definition of alimony (42 U.S.C. §662(c)) for purposes of 42 U.S.C. 659. Like the Railroad Retirement Act, any entitlement of a military retiree's spouse to an annuity is lost after divorce. (10 U.S.C.§1434(c)).

Respondent submits that the Alaska Supreme Court gave full consideration to the issue raised in the petition and decided it correctly. Its decision comports not only with *Hisquierdo v. Hisquierdo,* supra, but also with *Free v. Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 2d 180 (1962), and *Wissner v. Wissner,* 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950). This Court noted that had Congress elected to allow garnishment of military retired pay for purposes of property division in state court divorce proceedings it could have done so.[1] *Hisquierdo v. Hisquierdo,* supra, at 59 L.Ed. 2d at 16.

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[1]See Pub. L. 95-366, 92 Stat. 600 (1978)

2. The Writ Should Not Be Granted Because The Issue Raised In The Petition Is Of Minor Importance.

Respondent acknowledges that state courts are asked to address the issue raised in the petition. However, the question is of minor importance when viewed in light of the underlying issue initially prompting the inquiry.

The underlying issue that frequently seeks resolution is support of the divorced spouse who, following a marriage of some duration, is not otherwise eligible for retirement benefits.

The decisions reflect two results, one entitling the divorced spouse to a share of the retirement benefits, *In Re Fithian,* 10 Cal. 3d 592, 517 P.2d 449, 11 Cal. Rpt. 369 Cert. denied, 419 U.S. 829, 95 S.Ct. 41, 42 L.Ed. 2d 48 (1974), the other precluding any such division. *Hisquierdo v. Hisquierdo,* supra. In the latter event the divorced spouse is protected in that she can seek the equivalent of such a benefit with an application for spousal support. *Hisquierdo v. Hisquierdo,* supra, at 59 L.Ed. 2d page 14. Moreover, since military retired pay is viewed as income (26 U.S.C. §61(a) (11) it is appropriate to consider military retired pay in determining the amount awarded for spousal support.

3. The Writ Should Be Denied Because The Issue Raised In The Petition Is Not Yet Ripe For Review.

Since *Hisquierdo v. Hisquierdo,* supra, the highest courts of the following states have addressed the question of divisibility of military retired pay:

Arizona	*Czarnecki v. Czarnecki,* 123 Ariz. 466, 600 P.2d 1098 (1979).
California	*Henn v. Henn,* _____ Cal. 3d, _____, _____ P. 2d _____, 161 Cal. Rptr. 1196 (1980).
New Mexico	*Stephens v. Stephens,* 91 N.M. 1, 595 P. 2d 1196 (1979).

Although these three decisions ruled that retired military pay is divisible, it is of interest to note that *Hisquierdo v. Hisquierdo,* supra, and the supremacy argument contained therein received little or no discussion by these courts.

If this matter warrants review, it should be reserved for a future case where this court will have a wider variety of views from courts of last resort that more extensively discuss the supremacy argument and this court's holding in *Hisquierdo v. Hisquierdo,* supra.

CONCLUSION

For these reasons the petition for writ of certiorari seeking review of the opinion of the Alaska Supreme Court in this case should be denied.

Respectfully submitted,

Allen L. Jewell
HAHN, JEWELL & STANFILL
542 W. Second Avenue
Anchorage, Alaska 99501
Counsel for Respondent

APPENDIX

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

September 24, 1979

Max F. Gruenberg, Jr., Esquire
909 West Ninth Street
Suite 230
Anchorage, Alaska 99501

Re: Joanne Erskine Cose v.
Leroy Edward Cose A-243

Dear Mr. Gruenberg:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"Denied
9/21/79
WHR"

Please notify opposing counsel of this action.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By Patricia A. Dean
Assistant Clerk

th
I certify that a copy of the foregoing has been sent to Allen Jewell, Esq. at his address of record this 3rd day of October, 1979.

/s/ Max F. Gruenberg, Jr.

APPENDIX B

IN THE SUPREME COURT FOR THE STATE OF ALASKA

LEROY EDWARD COSE, *Appellant/Cross-Appellee*

v.

JOANNE ERSKINE COSE, *Appelle/Cross-Appellant.*

File Nos. 3243/3244

Order

On consideration of appellee/cross-appellant's motion for acceptance of second petition for reconsideration, filed October 5, 1979,

IT IS ORDERED:

The motion is denied. Entered at the direction of an individual justice at Juneau, Alaska, October 15, 1979.

CLERK OF THE SUPREME COURT

Connie Staska
Chief Deputy Clerk

cc: Counsel, Justices

APPENDIX C

Article VI, Clause 2 of the United States Constitution reads:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

10 USC §3911	(Pet. 17a)
10 USC §3929	(Pet. 17a)
10 USC §3991	(Pet. 17a, 18a)

10 USC §1434(c) reads in the relevant part:

> ". . . An election of an annuity under clause (3) of subsection (a) shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce."

26 USC 61 (a)(11) reads in the relevant part:

> "(a) General definition. Except as otherwise provided in this sub-title, gross income means all income from whatever source derived, including (but not limited to) the following items: . . . (11) Pensions; . . ."

42 USC §659 reads in the relevant part:

> "(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

42 USC §662 reads in the relevant part:

> "(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accorance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

No. 79-1469

JUL 24 1

MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOANNE ERSKINE COSE, PETITIONER

v.

LEROY EDWARD COSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE
Solicitor General

ALICE DANIEL
Assistant Attorney General

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Department of Justice
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(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1469

JOANNE ERSKINE COSE, PETITIONER

v.

LEROY EDWARD COSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether federal law prohibits the division of military retired pay in divorce proceedings in accordance with state community property law.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

A. *Military Retired Pay*

Under the military retirement statutes, a regular or reserve commissioned officer in the Army may request retirement after 20 years of service and become entitled to "military retired pay." 10 U.S.C. 3911, 3929. The computation of the benefit received by the service member is based on the number of years served and the rank attained. 10 U.S.C. 3991. These retirement plans are noncontributory in that neither the service member nor the federal government makes periodic contributions to any fund during the course of an officer's active service.[1]

Upon retirement, a regular officer remains subject to recall to active duty in times of need. 10 U.S.C. 3504, 8504. Additionally, Congress is free to alter or eliminate the military retirement system at any time. See *Lynch* v. *United States*, 292 U.S. 571, 576–577 (1934); *Bell* v. *United States*, 366 U.S. 393 (1961). Accordingly, anticipated benefits under the statutes are not "property" in the strictest sense. See *Flemming* v. *Nestor*, 363 U.S. 603, 609–611 (1960). Military retired pay is taxable as ordinary income when received. 26 U.S.C. 61(a)(11); 26 C.F.R. 1.61–11.

[1]The military retirement program is thus distinguishable from contributory programs such as those under the Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*, and the Social Security Act, 42 U.S.C 301 *et seq.*

Military retired pay terminates with the service member's death and thus does not pass to his heirs. The statutes, however, do provide a mechanism by which service members may elect to set aside a portion of their retired pay for survivors. Under the Retired Serviceman's Family Protection Plan, a participating service member may elect to reduce his retired pay in order to provide an annuity to a surviving spouse or child upon his death. 10 U.S.C. 1431–1446. Participation in the plan is entirely voluntary, and a service member may revoke his election "to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child." 10 U.S.C. 1431(c). Should the chosen beneficiary be rendered ineligible for the annuity through death or divorce, the retired pay is fully restored. 10 U.S.C. 1434(c) (no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce).

In 1972, Congress enacted the Survivor Benefit Plan to replace prospectively the Family Protection Plan. 10 U.S.C. 1447–1455. The original plan was actuarially sound, *i.e.*, the total amounts paid to survivors were equivalent in value to the amount withheld from the member's retired pay. Because benefits thus reduced the service member's pay, participation in the plan was low. Consequently, Congress provided in the Survivor Benefit Plan, or "widow's equity bill," as it was known (118 Cong. Rec. 29811 (1972)) that future retirees are to be participants unless they choose to opt out. 10 U.S.C. 1448(a). Present participants in the

Family Protection Plan were given the option of continuing participation or enrolling in the new plan Pub. L. No. 92-425, Section 3, 86 Stat. 711, as amended. Pub. L. No. 93-155, Title VIII, Section 804, 87 Stat. 615.

Both plans contain provisions prohibiting the garnishment or assignment of annuities. The Family Protection Plan provides: "No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process." 10 U.S.C. 1440. Similarly, 10 U.S.C. 1450(i), which is part of the Survivor Benefit Program, provides: "An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process." The only exception to these anti-assignment clauses is contained in Section 459 of the Social Security Act, 42 U.S.C. (Supp. II) 659, which permits garnishment of all federal benefits to satisfy a legal obligation for alimony or child support. "Alimony" is defined for these purposes "not [to] include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. (Supp. II) 662(c).

B. *The Present Proceedings*

Respondent served in the United States Army from 1954 until he retired as a Lieutenant Colonel on July 1, 1975 (Pet. App. 3a). Upon the divorce of respondent and petitioner on October 29, 1976,[2] the Anchorage

[2]The parties were married on November 14, 1954, five months after respondent commenced active duty (Pet. App. 3a).

Superior Court held respondent's military retired pay divisible under state law[3] and awarded petitioner one-half the $1,100 monthly payment,[4] terminable upon either party's death (Pet. App. 4a). Respondent appealed this order on two grounds—(1) that the retired pay was income and not property subject to division, and (2) that regardless of the court's characterization of retired pay, the division was barred by the Supremacy Clause since it interfered with the congressional purpose underlying the military retirement pay statutes (Pet. App. 4a).

The Alaska Supreme Court reversed (Pet. App. 3a–8a), holding that the Supremacy Clause prohibited the application of state property settlement concepts to military retired pay. The court based its decision on the legislative treatment of military retired pay and this Court's recent decision in *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), holding that California's application of community property law to railroad retirement benefits contravened the intent of Congress in violation of the Supremacy Clause.

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[3] Alaska Stat. § 9.55.210(6) (Michie July 1973 & Cum. Supp. 1979) provides:

> *Judgment.* In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide:
>
> * * * * *
>
> (6) for the division between the parties of their property, whether joint or separate * * *.

[4] Respondent was awarded custody of the parties' two minor children, and petitioner was ordered to deduct child support from her military retired pay award (Pet. App. 4a n.1).

The Alaska Supreme Court reasoned that, in enacting the military annuity provisions, Congress evidenced its intent to protect widows and not ex-wives, since only widows are eligible for benefits and since annuity payment deductions from retired pay cease upon divorce (Pet. App. 7a). After observing that Congress had stricken provisions that would have protected ex-wives before passage of the plan, the court concluded that "[o]ne searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce." *Ibid.* In view of its holding on the preemption issue, the court found it "unnecessary to classify retired pay as income or property under state law." *Ibid.*[5]

DISCUSSION

The principles applicable to the question presented in this case have been established in several decisions of this Court concerning the relationship between federal statutes and state family law. As the Court re-

[5]The Alaska Supreme Court observed that those courts holding that military retired pay is "property" divisible upon divorce have reasoned that the pay compensates for past services and is part of the consideration earned by the serviceman (Pet. App. 5a). See, *e.g.*, *Ramsey* v. *Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974); *Payne* v. *Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973); *LeClert* v. *LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). Other courts have rejected this reasoning and held that military retired pay is income to the recipient rather than divisible property, because it has no lump sum value, cash surrender value, loan value, redemption value, or value realizable after death. See, *e.g.*, *Ellis* v. *Ellis*, 552 P.2d 506 (Colo. 1976); *Fenney* v. *Fenney*, 259 Ark. 858, 537 S.W. 2d 367 (1976).

cently remarked in *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), where the application of "state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted." *Id.* at 581, quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904). Where state family and family-property law "do 'major damage' to 'clear and substantial' federal interests, * * * the Supremacy Clause will demand that state law be overridden." *Ibid.*, quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966).

In our view, state courts' treatment of military retired pay as divisible property under state law (a treatment distinct from awarding alimony, based on an assessment of need, to be paid out of such benefits) is inimical to the objectives of the federal program. Accordingly, under *Hisquierdo* and earlier decisions of this Court reaffirmed in *Hisquierdo*, such an application of state law is preempted. The Alaska Supreme Court correctly applied *Hisquierdo* in this case, but its decision is in conflict with the decisions of the highest courts of other states on a matter of federal law. Because the issue is an important and frequently recurring one, and because the uncertainty has created problems in the administration of the military retired pay program, we ask this Court to grant the petition for certiorari and affirm the decision below.

1.a. In *Wissner* v. *Wissner*, 338 U.S. 655 (1950), an Army officer named his mother and father as beneficiaries under his National Life Insurance Policy, making

no provision for his wife.[6] The National Service Life Insurance Act provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary or beneficiaries * * *." 338 U.S. at 658. In addition, the Act provided that the beneficiary would be "exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* at 659. This Court held that California could not apply its community property law to the insurance proceeds because "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.* at 658. The Court reasoned that the lower court judgment requiring that one half of the policy proceeds be paid to the widow "nullifies the soldier's choice and frustrates the deliberate purpose of Congress." *Id.* at 659. See also *Free* v. *Bland*, 369 U.S. 663 (1962) (survivorship provision in federal law regarding United States Treasury bonds takes precedence over Texas community property law).

In *Hisquierdo* v. *Hisquierdo*, *supra*, this Court recently reaffirmed the principle of *Wissner*. In *Hisquierdo*, the California Supreme Court held that because a husband's railroad retirement benefits flowed in part from the husband's employment during the marriage, they were community property, even though under federal law the retiree had no enforce-

[6] The policy's premiums were paid out of the husband's salary, which was community property under California law.

able contract right to the benefits. 439 U.S. at 580. This Court reversed, holding that both the express language of the Railroad Retirement Act of 1974, which included an anti-assignment provision (45 U.S.C. 231m), and the purpose of the Act required that the benefits be shielded from division pursuant to state community property law. 439 U.S. at 585.

Although the Railroad Retirement Act provided additional benefits to non-employee spouses meeting certain requirements (45 U.S.C. 231c) such benefits terminated when "the spouse and the [employee] are absolutely divorced." 45 U.S.C. 231d(c)(3)(B). The Court concluded that "th[is] choice was deliberate" and that therefore "[a]ny automatic diminution of that amount frustrates the congressional objective." 439 U.S. at 585.[7] In reaching this result, the Court stated that "[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Id.* at 583.

b. The military retired pay statutes, read in light of the principles set out in *Wissner* and *Hisquierdo*, answer both of these questions affirmatively. Underlying the military retirement program is a congressional de-

[7]The Court also reasoned that any reduction in benefits received would discourage the divorced employee from retiring (contrary to the Act's objective of assuring jobs for younger workers), because the former spouse has no claim to salary earned after the marital community is dissolved. 439 U.S. at 585. Moreover, the Court noted that when the Act was revised in 1974, a proposal to provide divorced spouses a benefit like that available under the Social Security Act (see 42 U.S.C. 402(b)(1)) was rejected. 439 U.S. at 585.

sire to bolster the morale of service members, provide an incentive for persons to remain in the armed services, and afford them material protection in later years. *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974). Congress has characterized military retired pay as the service member's "personal entitlement payable to the retired member himself as long as he lives." S. Rep. No. 1480, 90th Cong., 2d Sess. 6 (1968). An automatic dilution, under state community property law, of this unrealized entitlement would be at odds with the supportive purpose of the retirement program (see Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 Cal. St. Bar J. 12, 14 (1973)) as well as inconsistent with a more recent enactment that affects federal benefits generally by permitting garnishment for alimony (as narrowly defined) and child support.

Unlike the Railroad Retirement Act (see 45 U.S.C. 231c), the military retired pay statutes provide no employer-financed spousal benefits. The only mechanism by which a service member may provide an annuity for a surviving spouse or child is by electing to reduce his retired pay. 10 U.S.C. 1431–1446, 10 U.S.C. 1447–1455. Participation in these plans is entirely voluntary. As the House Report noted, "[t]he rights in retirement pay accrue to the retiree, and, ultimately, the decision is his as to whether or not to leave part of that retirement as an annuity to his survivors." H.R. Rep. No. 92–481, 92d Cong., 1st Sess. 9 (1971). Should the service member elect to participate in the plan, the right left to the surviving spouse is in the annuity and *not* the retired pay. See H.R. Rep.

No. 951, 90th Cong., 1st Sess. 5 (1967).[8] State court decisions awarding divorced wives a half interest in retired pay thus place ex-wives in a better position than that enjoyed by most widows under the military retirement statutes, because a widow receives monthly annuity payments generally amounting to less than half of monthly retired pay if her husband elected to participate in the annuity plan and she receives nothing at all if her husband elected not to participate. See *In re Fithian*, *supra*, 10 Cal. 3d at 600, 517 P.2d at 454, 111 Cal. Rptr. at 374.

This result is particularly anomalous in light of Congress' decision to designate widows, but not ex-wives, as eligible beneficiaries of annuities (10 U.S.C. 1434(a); 10 U.S.C. 1447(3), 1450(a)) and to provide in the Family Benefit Plan that deductions from retired pay for a wife's annuity cease upon divorce (10 U.S.C. 1434(c)). Congress deliberately made this policy decision at the urging of the Department of Defense in order "[t]o safeguard the participants' future retired pay when

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[8] Annuities under both plans are protected by anti-assignment provisions (10 U.S.C. 1440; 10 U.S.C. 1450(i)). See page 3, *supra*. State courts have drawn different conclusions concerning the applicability of these provisions to retired pay itself. See *In re Musser*, 70 Ill. App. 3d 706, 710, 388 N.E. 1289, 1292 (1979) (there is no provision similar to 45 U.S.C. 231m in the Railroad Retirement Act precluding attachment of military pay); *Czarnecki* v. *Czarnecki*, 123 Ariz. 466, 600 P.2d 1098, (1978) (although anti-assignment language in 10 U.S.C. 1440 is similar to 45 U.S.C. 231m, Section 1440 is applicable only to annuities under the Family Protection Plan and not to retired pay); *Gorman* v. *Gorman*, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479, 482 (1979) (anti-assignment provision applicable to military retired pay is narrower than anti-assignment clause construed in *Hisquierdo*).

* * * divorce occurs* * *." S. Rep. No. 1480, 90th Cong., 2d Sess. 13 (1968), quoting letter of the Acting General Counsel, Department of Defense, dated August 8, 1967.

Although the Survivor Benefit Plan contains no express provision for terminating annuity deductions upon divorce, the congressional policy did not change. That plan was enacted in response to Congress' concern for the number of widows deprived of support because of low participation in the Family Protection Plan, rather than out of a desire to provide for ex-wives. See S. Rep. No. 92-1089, 92d Cong., 2d Sess. 11 (1972). Indeed, in considering the Survivor Benefit Plan, Congress rejected a provision that would have permitted attachment of up to 50% of retired pay to comply with a court order in favor of a spouse, former spouse, or child. See *id.* at 25. The provision was rejected primarily because it would have "single[d] out military retirees for a form of enforcement of court orders imposed on no other employees or retired employees of the Federal Government." 118 Cong. Rec. 30151 (1972) (remarks of Rep. Pike). Thus, Congress determined that military retired pay should not alone be subject to attachment and that the problem should be considered in connection with legislation covering all federal pay. See S. Rep. No. 92-1089, *supra*, at 25.

Subsequently, Congress enacted legislation providing that, notwithstanding any contrary law, federal benefits, including those of members of the armed services, may be subject to legal process to enforce an individual's obligations to provide *child support* or *alimony payments*. 42 U.S.C. (Supp. II) 659(a). This

provision was part of a package of measures designed to combat increases in welfare payments resulting from the difficulty of compelling payment of support obligations from solvent but unwilling parents. See S. Rep. No. 93-1356, 93d Cong., 2d Sess. 42-43 (1974). In 1977, Congress added a definitional statute to provide that "alimony" does not include "any payment or transfer of property * * * in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. (Supp. II) 662(c).

In light of the legislative history of these amendments, this Court in *Hisquierdo* found it "logical to conclude that Congress * * * thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that community property claims, which are not based on need, could not do so." 439 U.S. at 587. The Court added that "Congress may find that the distinction it has drawn [between community property settlements and spousal support based on need] is undesirable" but that it is a choice for Congress to make and "[i]t is not the province of state courts to strike a balance different from the one Congress has struck." 439 U.S. at 590. Because 42 U.S.C. (Supp. II) 659(a) applies to military retired pay as well as to railroad retirement benefits, the Court's conclusions in *Hisquierdo* are equally applicable here.[9]

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[9]The Comptroller General has ruled that in light of 42 U.S.C. (Supp. II) 659(a) and the 1977 definitional amendment, military retired benefits are not subject to division under community

In fact, Congress recently enacted legislation allowing garnishment of federal civil service retirement benefits to the extent expressly provided for in the terms of any "court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." 5 U.S.C. (Supp. II) 8345(j). Congress has enacted no comparable provision allowing garnishment or division of other federal benefits.[10] Until it enacts such a provision with respect to military retired pay, state courts may not order a division of such pay under state community property law.

2. Prior to this Court's decision in *Hisquierdo*, state courts grappled with the question whether dividing military retired pay pursuant to state family property law frustrated the federal policy in contravention of the Supremacy Clause. See, *e.g.*, *In re Fithian*, *supra*; *Chisnell* v. *Chisnell*, 82 Mich. App. 699, 267 N.W.2d 155 (1978), cert. denied, 442 U.S. 940 (1979); *Ramsey* v. *Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

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property statutes. See *In re Wells*, 57 Comp. Gen. 420 (1978). See also *United States* v. *Stelter*, 567 S.W. 2d 797 (Tex. 1978) (United States cannot be made party to a Texas garnishment proceeding to enforce a divorce decree dividing military retired pay as community property).

[10] Legislation has been introduced in Congress that would affect the status of military retired pay. H.R. 2817, 96th Cong., 1st Sess. (1980), would establish an entitlement in favor of a divorced spouse who has been married to a service member for at least ten years to a portion of the member's retired pay and a portion of the survivor's annuity. H.R. 6270, 96th Cong., 2d Sess. (1980), would provide for the payment of military retired pay pursuant to a local divorce decree or legal separation. The latter proposal would thus achieve the same result as the recently enacted civil service legislation. See 5 U.S.C. (Supp. II) 8345(j).

Although *Hisquierdo* should have resolved the question against such an application of state law, several state supreme courts, in the short time since *Hisquierdo* was decided, have reached decisions contrary to that of the Alaska Supreme Court in this case. See *Czarnecki* v. *Czarnecki*, 123 Ariz. 466, 600 P.2d 1098 (1979); *Henn* v. *Henn*, 605 P.2d 10, 12 n.3, 161 Cal. Rptr. 502, 504 n.3 (1980); *In re Miller*, 609 P.2d 1185 (Mont. 1980).

As a result of the disagreement over whether *Hisquierdo* is controlling, federal military retired pay is currently subject to inconsistent treatment under state domestic relations law and has been held divisible in numerous divorce proceedings in community property and common law states (Pet. App. 4a–5a). These federal benefits affect far more people than were affected by the railroad retirement system involved in *Hisquierdo*. The Department of Defense appropriation for military retired pay for fiscal year 1979 alone exceeded $10 billion.

With the increasing incidence of divorce, this lack of uniform treatment of military retired pay creates problems both for those administering the program and for its beneficiaries, the retirees. Moreover, since several state courts have held that unmatured retired pay earned during the marriage is to be divided upon retirement, present members of the military seeking divorce are similarly affected. See *e.g. Cearley* v. *Cearley*, 544 S.W. 2d 661 (Tex. 1976). The mobility of the military population, coupled with the likelihood of transfer, complicates the problem and encourages forum shopping. Because we believe the principles of

Wissner and *Hisquierdo* are controlling here, we ask this Court to grant the petition for certiorari to resolve the current uncertainty and resulting injury to the military retired pay system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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